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# In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 53

LAWRENCE C. KINGSLAND, COMMISSIONER OF PATENTS, PETITIONER

v.

## VERNON M. DORSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR THE PETITIONER

#### OPINIONS BELOW

The findings and opinion of the District Court of the United States for the District of Columbia (R. 14-35) are reported at 69 F. Supp. 788.

The entire transcript of record of the proceedings before the Patent Office consisting of three printed volumes of testimony and exhibits plus several separately printed Exhibit volumes was in the record before the courts below and has been certified to this Court. By stipulation of counsel, only the joint appendix and excerpts from the evidence before the Patent Office's Committee on Enrollment and Disbarment have been reprinted in the record here and will be referred to as R.—. The portions of the transcript of the record before the Patent Office which have not been reprinted and to which the parties are free to refer (R. 91), will be referred to as Tr.—, or in the case of a separately printed Exhibit as Ex.—.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 69-84) is reported at 173 F. 2d 405.

#### JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1949 (R. 84-85). The petition for a writ of certiorari was filed on April 15, 1949, and was granted on May 31, 1949 (337 U. S. 914, R. 87). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

- 1. Whether the standards of ethical conduct for practice before the Patent Office approved by this Court in *Hazel-Atlas Glass Co.* v. *Hart-ford-Empire Co.*, 322 U. S. 238, were binding on the court below in reviewing an order of the Commissioner of Patents which barred respondent from practice before the Patent Office.
- 2. Whether there was sufficient evidence in the record before the Commissioner of Patents to support his order barring respondent, one of Hartford's attorneys, from practicing before the Patent Office on the ground that he had participated in perpetration of the fraudulent scheme specifically condemned by this Court in the Hazel-Atlas case.
- 3. Whether there was any denial of due process of law in the proceedings leading up to the Commissioner's order barring respondent from practice before the Patent Office.

## STATUTE INVOLVED

## 35 U.S.C. 11 reads as follows:

The Commissioner of Patents, subject to the approval of the Secretary of Commerce, may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing applicants or other parties before his office, and may require of such persons, agents, or attornevs, before being recognized as representatives of applicants or other persons, that they shall show that they are of good moral character and in good repute, are possessed of the necessary qualifications to enable them to render to applicants or other persons valuable service, and are likewise competent to advise and assist applicants or other persons in the presentation or prosecution of their applications or other business before the Office. The Commissioner of Patents may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before his office any. person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who refuses to comply with the said rules and regulations, or who shall, with intent to defraud in any manner, deceive, mislead, or threaten any applicant or prospective applicant, or other person having immediate or prospective business before the office, by word, circular, letter, or by advertising. The reasons for any such suspension or exclusion shall be

duly recorded. The action of the commissioner may be reviewed upon the petition of the person so refused recognition or so suspended or excluded by the district court of the United States for the District of Columbia under such conditions and upon such proceedings as the said court may by its rules determine.

#### STATEMENT

A. Background.—Vernon M. Dorsey, respondent herein, is an attorney who during the period covered by the facts here involved was patent counsel in charge of the prosecution of some of the more important patent applications—including the Peiler application—under associate powers of attorney for Hartford Empire Company (R. 115, 161). He was a member of Hartford's Board of Directors (R. 41). He was not merely local counsel, as he now seeks to imply. (Br. in opp. 12.)

The July 17, 1926, issue of the National Glass Budget, a trade publication in the glass industry, contained an article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor, by William P. Clarke, President, American Flint Glass Workers Union." The attorneys for Hartford-Empire Company filed a copy of this article, accompanied by a letter of transmittal signed by Dorsey, along with other things in the Patent Office on October 11, 1926, as an appendix to the supplemental

amendment to Hartford's Peiler application No. 294,792 (Ex. E, pp. 303-5). That application, which had been filed on May 5, 1919, sought a patent for a method of and apparatus for feeding molten glass. (R. 48-49, Ex. HB-61, R. 151-154.) At the time this supplemental amendment was filed, the claims in the application had been rejected once by the Primary Examiner. After the second and final rejection of the claims by the Primary Examiner, the Clarke article was reprinted in the Appendix to a brief, signed by Dorsey and Robson D. Brown, and was urged, inter alia, upon the Office's Board of Appeals as the recognition by a reluctant witness of the tremendous success of Hartford's feeders (R. 143, Ex. E, pp. 477-478, 509, 593-605). The Board of Appeals affirmed the Examiner's holding that the claims were unpatentable over the prior art (Ex. E, pp. 684-691). At rehearing, in connection with which a brief signed by Dorsey was filed, the Examiner was reversed and the claimed invention held patentable with respect to all but two claims. Patent No. 1,655,391 (Peiler patent) was issued on January 3, 1928 (Ex. E, pp. 732-734). In the subsequent patent infringement litigation with Hazel-Atlas Glass Company over this patent, the Clarke article was cited in Hartford's brief in the Third Circuit Court of Appeals and quoted extensively by Judge Buffington in his opinion in 1932, holding (Judge Woolley dissenting) that the Peiler patent was valid

and had been infringed. Hartford-Empire, Co. v. Hazel-Atlas Glass Co., 59 F. 2d 399. See, also, Shawkee Mfg. Co. v. Hartford-Empire Co., 68 F. 2d 726 (C. A. 3).

In the course of the Government's antitrust proceeding against Hartford begun in 1939 in the United States District Court for the Northern District of Ohio, Western Division, the fact was brought to light that the Clarke article had been written by an employee of Hartford, named Hatch, who had persuaded Clarke to sponsor the article, for the purpose of filing it with the Patent Office as the views of an apparently unprejudiced and reluctant witness. United States v. Hartford-Empire Co., 46 F. Supp. 541, 612 (N. D. Ohio). Based on the information thus disclosed, Hazel-Atlas and Shawkee Mfg. Co. petitioned the Court of Appeals for the Third Circuit to vacate and set aside its prior judgments on the ground of fraud. That court, while it described the "story" as "sordid" and named four men, including Dorsey, as participants in the fraudulent scheme, held that it was without power to reopen its judgment. Hartford-Empire Co. v. Hazel-Atlas Co., 137 F. 2d 764, 766. This Court, in reversing, was unanimous in its condemnation of the Clarke transaction as fraudulent. Hazel-Atlas Co. v. Hartford-Empire Co., 322 U. S. 238, 245-246, 251.

B. The Disbarment Proceeding.—On October 11, 1944, shortly after this Court's denial of re-

hearing in the Hazel-Atlas case (322 U. S. 772), the Commissioner of Patents issued separate orders to Dorsey, Hartford's Washington patent attorney (see supra, p. 4), Roswell F. Hatch, Robson D. Brown, employees of Hartford, and Henry W. Carter, an official of Owens-Illinois Bottle Company (the four men named in the Third Circuit's opinion as the perpetrators of the fraud) to show cause why each should not be suspended or excluded from further practice before the Patent Office for gross misconduct as a result of their activities in this transaction (R. 9-10). In the order, the Commissioner set November 9, 1944, as the date for hearing before his Committee on Enrollment and Disbarment, and charged that it appeared from the records in the Hazel-Atlas and antitrust cases that each of these men-

participated in the preparation of [the Clarke] article and/or the presentation thereof to the United States Patent Office during the prosecution of said patent application knowing that said article was not written by said William P. Clarke, and with the purpose of deceiving the Patent Office as to the authorship of said article and influencing the action of the Patent Office on said application

In accordance with the show cause orders, a hearing was held beginning on November 21, 1944, before a Committee on Enrollment and Disbarment composed of seven Patent Office officials.

The case on behalf of the Patent Office consisted solely of the official records in the Hazel-Atlas and the antitrust case, which were introduced as the basis for the show cause orders, and as evidence for the limited purpose of proving against each respondent admissions and letters and documents written or received by that respondent (R. 41, 106-107). Thereafter, all of the respondents testified and called and examined witnesses. At the close of the hearing, time was granted to file briefs, after which oral argument was heard by the Committee, with the Commissioner sitting in (R. 16). On April 26, 1945, the Committee submitted a report to the Commissioner setting out its findings which may be briefly summarized as follows (R. 36-68):

C. Committee's Findings.—In the latter part of 1925, Carter discussed with Brown, who in turn discussed with Dorsey, their interest in having an article prepared and signed by "some competent authority and placed before the Examiner" relating to gob feeders for filing in the Peiler application (R. 42, 117, 123–124). Shortly thereafter, Hatch, who reported to, and consulted with, Brown as his superior officer in Hartford, commenced the preparation of an article relating to automatic glass machines, which was completed early in 1926. (R. 42). The principal object of the article admittedly was to make a comparison "between the commercial success of the Owens suction machine and feeders of the gob type"

(R. 42-43, Tr. 531). In the preparation of the article, Hatch consulted both Dorsey and Carter as well as the Reports of the Annual Conventions of the Glass Bottle Blowers Association (a labor union) and various other publications. (R. 42-43, 124, 125.) As finally drafted by Hatch, the article quotes extensively from these reports in order to provide "bait" to induce a labor leader named James Maloney who was President of the Glass Bottle Blowers Association to sign the article (R. 43, 150 (Ex. D-72-C)). Carter was fully informed about these matters, and severely criticized the accuracy of the article and suggested important changes therein (R. 44, Tr. 745, Ex. C-70-3), but Hatch indicated that he had "prepared this article so far as possible with reference only to the proceedings of The Bottle Blowers Association, and knowingly and intentionally I reproduced some of the errors found therein" (R. 44, 148 (Ex. C-70-4), D. Ex. B, p. 40). Brown was likewise informed and he authorized Hatch to go ahead (R. 45, Tr. 356, 417, 418, 474).

Dorsey was also provided with a manuscript copy of the article (R. 126, 132-133). Dorsey made two or three minor corrections in the manuscript and returned it to Hatch (R. 45, 125). Dorsey knew that Hatch intended to ask Maloney to sign the article, and stated that he desired a copy when signed for filing in the Peiler application (R. 45, 133-134, 138-139). Subsequently,

he wired Hatch for a copy (R. 45, 140). In his response of May 20, 1926, apparently enclosing a copy of the article, Hatch informed Dorsey that Maloney had refused to sponsor the article; that Clarke had "swallowed the labor bait" and that while he would probably change it considerably, "I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planned. I will see that you get a copy of some Journal in which this article appears when it comes out." (R. 45-46, 149-150 (Ex. D-72-C).)

In the course of obtaining clearance from Owens, Carter, on May 25, 1926, addressed a memorandum to W. H. Boshart, its President, in which he said in part (R. 48, Tr. 763 (Ex. C-70-7), D. Ex. B, p. 41):

It occurs to me that I should make myself more clear about the purpose of the Hatch article.

He has prepared it with the idea of getting it printed under the name of some apparently unprejudiced authority, and then calling the attention of the Patent Office Examiner to the article as published, in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims.

Under the circumstances, I do not see that we need be very critical in our treat-

<sup>&</sup>lt;sup>2</sup> The letter is reproduced more fully infra, pp. 31-32.

ment of the article. If not too rank, would say that we better let it go through. Of course any particular statements can be corrected or cut out.

Owens thereupon agreed to the publication of the article. Immediately upon receiving, in addition, the consent of Maloney which he desired, Clarke on July 7, 1926, telegraphed Hatch that he would "sponsor article with very slight alteration and modifications" (R. 48, Tr. 778 (Ex. HB-10), D. Ex. B, p. 132). Clarke signed the article some time the next day and handed it to Hatch, who was then in Philadelphia (R. 48). Hatch forwarded the article without delay to the editor of the National Glass Budget requesting that it be published promptly and advising him that Clarke would "not insist on seeing a proof if it is going to take extra time" (R. 48, Tr. 543). The article appeared in the July 17, 1926, issue of the National Glass Budget (R. 48-49). Dorsey requested a copy of the article (R. 50, 134), and a copy as printed was presented by Dorsey and Brown to the Patent Office as part of the October 11, 1926, amendment in the Peiler application (R. 52-53). The Committee noted that from the stardpoint of practice, the filing of this amendment was timely since the Examiner was on the verge of finally rejecting all of the claims in the application (R. 52). Later, Dorsey and Brown also referred to the article in a brief filed with the Board of Appeals, as indicated supra, p. 5.

The Committee went on to describe Hartford's payment of \$8,000 to Clarke shortly after the decision of the Court of Appeals for the Third Circuit which quoted extensively from the article (R. 54-60). These events occurred nearly six years after the filing of the article and, as the Committee noted, "cast their light backwardly on the activities of the parties during the time of preparation and filing of the Clarke article, giving added illumination with regard to the purposes, understandings, and intentions of [defendants] at that time" (R. 54-55). The Committee noted that Dorsey did not participate in these events (R. 55).

Based on these findings, the Committee was unanimously of the opinion that the record conclusively established that (R. 66)

concealment all of the respondents deliberately collaborated not only with each other but also directly or indirectly with Clarke, and that all of the respondents connived with each other with the intention of misleading and deceiving the officials of the Patent Office as to the true state of the said material facts concerning the connection of Hartford with the preparation and publishing of the article with Clarke's name appearing thereon as the author thereof, when in fact he was not the true author thereof, and all this for the purpose of securing favorable action by the Patent

Office with respect to the claims in the Peiler application.

Five members of the Committee accordingly recommended to the Commissioner that respondents be disbarred from further practice before the Patent Office; the remaining two members recommended suspension for a definite period of time (R. 67). The Commissioner, on May 18, 1945, ordered the disbarment of all four respondents (R. 10-11).

D. Court Review.—Three of the respondents sought review of these orders in the United States District Court for the District of Columbia in accordance with 35 U.S.C. 11. The District Court, after hearing extensive argument lasting five days, affirmed the Commissioner's order (R. 14-35). Commenting that in such proceedings its function was limited to a determination whether a fair hearing had been had after due notice of the charges and whether there was substantial evidence to support the Commissioner's action (R. 18), the court held that the charges in the show cause orders were sufficient basis to sustain the Commissioner's action and sufficiently apprised defendants of the matters they were called upon to answer, and that there was substantial evidence in the record here to support the Commissioner's action. This conclusion was reached after a de-

The fourth, Robson D. Brown, died in the period between the Commissioner's order and the filing of the petition for review.

tailed review of the evidence in the record as to the preparation and filing of the Clarke article, and after referring to the events occurring thereafter "only as they may throw light upon the acts of the petitioners and their intent with respect to the Clarke article" in regard to the proceedings before the Patent Office (R. 25). On the appeal to the court below taken only by respondent, the judgment of the District Court was reversed by a divided court. Judge Clark delivered the opinion in which Judge Miller concurred (R. 69-83). Judge Edgerton dissented in a separate opinion (R. 83-84).

## SUMMARY OF ARGUMENT

## 1

A. The court's holding that the preparation and filing of the so-called Clarke article did not involve fraud upon the Patent Office is grounded primarily on a disagreement with this Court as to what constitutes fraud upon an administrative agency. Its view that the test of fraud should be the truth or falsity of the article is in square conflict with this Court's flat rejection of that very contention in the Hazel-Atlas case. Its castigation of the Patent Office for relying on the article ignores this Court's refusal to consider as relevant the materiality of the misrepresentations. "The fact of concealment" this Court noted in Federal Communications Commission v. WOKO, Inc., 329 U. S. 223, 227, "may be more significant than the facts concealed." When the record here is viewed

in the light of this Court's standards, it clearly supports the Commissioner's conclusion that the Clarke transaction was fraudulent.

B. There was ample evidence to connect Dorsey with the fraud. The evidence on which the Commissioner's conclusion is based consists principally of affidavits and evidence introduced by Dorsey himself. Dorsey admits that he had made changes in the article when it was presented to him for revision; that long before the article was printed, he intended to use it when printed in connection with the proposed amendments to Hartford's Peiler application; and that when he filed the article, he was aware of the connection between the article as published and as prepared by Hatch. Nevertheless, he concededly never disclosed the true facts to the Patent Office, but described the article in his brief as that of a "reluctant witness." This evidence, we believe, conclusively demonstrates Dorsey's knowing participation in the fraud.

C. Since the evidence conclusively shows that Dorsey had participated in the perpetration of the fraud on the Patent Office, the disposition of the case does not depend upon the scope of judicial review under 35 U.S. C. 11. Nevertheless, we submit that dissenting Circuit Judge Edgerton and District Judge Morris were correct in holding the substantial evidence rule applicable. The statute here does not define the scope of review, and the normal inference would be that

Congress meant the traditional test applied in reviewing administrative action generally to govern. The substantial evidence test has long been applied by this Court when the scope of review has not been statutorily defined, in the absence of any specific statutory provision to the contrary. Interstate Commerce Commission v. Louisville & N. R. R., 227 U. S. 88, 92; Shields v. Utah Idaho Central R. Co., 305 U. S. 177. The test has recently been approved by Congress for general application in Section 10 (e) of the Administrative Procedure Act. Even if the substantial evidence rule is not controlling, the findings of the Patent Office officials who heard the evidence must be given great weight, and not set aside unless clearly erroneous. The "clearly erroneous" rule contained in Rule 52 (a) of the Rules of Civil Procedure embodies the longestablished practice of the courts in recognizing the advantage in finding facts of the tribunal which actually sees and hears the witness. The court below erred in failing to give this factor any weight. And even if the record be viewed entirely de novo, without regard for the administrative findings, the evidence conclusively establishes Dorsey's gross misconduct and justifies the order barring him from practice before the Patent Office.

## II

A. Dorsey was accorded a fair hearing before, the Patent Office. Consolidating Dorsey's case with that of the other respondents involved no deprivation of due process, for the record on its face shows clearly Dorsey's explicit consent to the consolidation. At no time in the proceedings before the Patent Office or thereafter has he questioned the propriety of this consolidation. And even in the absence of express consent, consolidation in the interest of trial convenience for the making of the joint record would have been proper.

The record equally clearly reveals that the burden of proving innocence was not imposed upon Dorsey. All that happened was that the burden of going forward with evidence was shifted to respondents as a result of a prima facie case made by the introduction into the record of material in the records in the Hazel-Atlas and antitrust cases. This burden was voluntarily accepted by them. In any case, the question is immaterial since the record conclusively showed Dorsey's gross misconduct.

B. Nor is there any substance to the holding below that Dorsey was not given adequate notice of the matters for which he was ordered disbarred. There actually was no discrepancy between the charge in the show cause order as to the representation of authorship of the Clarke article and the finding of guilt in that respect. The difference relied on by the court merely amounted to different formulations of the same thing. Moreover, even if there had been a dis-

crepancy, there would be no deprivation of due process, for disbarment proceedings are civil, not criminal, in nature and the notice given need not spell out the charges with the specificity of a criminal indictment. Informal notice of the charges is sufficient.

Dorsey's disbarment was not predicated on participation either in the use of the Clarke article in the Court of Appeals for the Third Circuit, or in Hartford's payment of \$8,000 to Clarke in 1932, since he was found not to have participated in those events. The Committee's discussion of these matters explicitly noted that they were referred to only for the light they cast on respondents' conduct in regard to the filing of the Clarke article in the Patent Office.

Although the order to show cause did not charge explicitly a misrepresentation of the contents of the Clarke article to the Patent Office, that point arose during the course of the same transaction as the misrepresentation as to authorship and was fully explored in the evidence, largely at the instance of respondents' counsel. The basic evidence consisted of the same documents involved in the other misrepresentation. Dorsey was given a full opportunity to explain his conduct in this respect. Accordingly it was not improper for the Patent Office to conform its findings to the evidence. Compare Federal Rules of Civil Procedure, 15 (b), 54 (c). In any event the disbarment was fully supported by the finding as

to fraudulent concealment of the authorship of the article.

## III

The 18-year interval between the Clarke transaction in 1926 and the issuance of the show cause order in 1944 does not invalidate Dorsey's disbarment. There is no statute of limitation applicable, as Dorsey has conceded. Nor was the Commissioner guilty of laches in issuing the order. The fraud was successfully concealed for thirteen years and brought to light in the course of the Government's antitrust proceedings against the Hartford-Empire Company. The Commissioner of Patents acted promptly after the final termination of the Hazel-Atlas case. In re Adriaans, 28 App. D. C. 515, relied on below is distinguishable.

#### ARGUMENT

## T A CONTRACT / I

DORSEY WAS PROPERLY DISBARRED FROM PRACTICE BE-FORE THE PATENT OFFICE FOR PARTICIPATING IN THE FRAUD PERPETRATED ON THAT OFFICE IN CONNECTION WITH THE CLARKE ARTICLE

The statute (35 U. S. C. 11) authorizes the Commissioner of Patents to "exclude " " from further practice before his office any " attorney shown to be incompetent or disreputable, or guilty of gross misconduct". In the present case Dorsey was found to have been guilty of gross misconduct (R. 66, 10-11) for participating in what this Court has described as "a scheme to defraud not only the Patent Office but the Circuit Court of Appeals." Hazel Atlas

Co. v. Hartford-Empire Co., 322 U. S. 238, 245—246. Although the statutory test of "gross misconduct" may impose upon attorneys practicing before the Patent Office more stringent standards of behaviour than the avoidance of fraud, there can be no question that a scheme to defraud the Patent Office would be such misconduct as would warrant revoking the privilege of practicing before that Office.

The conclusion of the court below that the disbarment order was not supported by the evidence in the record is based upon several errors. Its holding that there was no fraud involved in preparing the Clarke article and presenting it to the Patent Office was based on standards squarely in conflict with those prescribed by this Court's recent decisions, particularly the Hazel-Atlas case which involved this very same transaction. In addition, the court erred in holding that the evidence in the record does not show that Dorsey participated in that transaction. On the contrary the evidence conclusively shows that Dorsey was a knowing and willing participant.

An additional ground of the action below was that there was no evidence to support the charges (for which the court below found Dorsey had been disbarred), that he had participated in the use of the Clarke article in the litigation before the Court of Appeals for the Third Circuit and in the payment of \$8,000 by Hartford to Clarke in 1932. We do not discuss whether there was any evidence in regard thereto, for as we point out (infra, pp. 67-70), Dorsey was not charged with having participated in these matters, nor was he disbarred on any such ground.

A. THE CLARKE TRANSACTION INVOLVED FRAUD UPON THE PATENT OFFICE

The holding below, that there was no fraud on the Patent Office involved in preparing the Clarke article and filing it with the Patent Office, indicates a clear disagreement with this Court's decisions as to what constitutes fraud. "We do not believe," the court stated, "that Dorsey was guilty of any dereliction of his duty as a member of the Patent Bar by his failure to make known the exact contribution of several people to the preparation of the article, even if he had known it. The test should have been the truth or falsity of the facts set out in the article and we do not understand that the truth of these statements has been called into question in any quarter" (R. 80). It also held that the finding of fraud was improper because the Patent Office should not have relied on the article. It regarded this reliance as being a dereliction of that office's duty "to investigate these matters for itself, not to shift the burden of its own responsibilities to a blind reliance on some article presented from some trade journal, which with ordinary intelligenee it might have known to be self-serving for the party offering it" (R. 71-72).

These statements ignore completely the controlling decisions of this Court, particularly the

<sup>\*</sup>The court below did not, in its discussion of these questions, refer to any of these decisions although the Commissioner, in his brief, relied on these cases and discussed them at length.

Hazel-Atlas case which involved the propriety of this very transaction. In the Hazel-Atlas case, Hazel-Atlas was seeking to have vacated a judgment entered in 1932 by the Court of Appeals for the Third Circuit against it in favor of Hartford sustaining the Peiler patent. The basis of the Hazel-Atlas petition was that Hartford had perpetrated fraud upon the Patent Office and the Court of Appeals in connection with the so-called Clarke article. Hartford there urged upon this Court, in line with the holding below here, that the Clarke article was in fact true, and hence that its failure to disclose that its employees had prepared the article was immaterial. See Brief for Respondent in No. 398, October Term, 1943, pp. 43-47. This Court flatly rejected that contention: "Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators." 322 U.S. at 247.

<sup>•</sup> The District Court's opinion pointed out in this connection (R. 33): "The truth of the statements in the Clarke article was not an issue in these proceedings. It was expressly stated during the course of the hearings that it was not. Even though the article contained no mistakes or false statements, its weight as evidence depends as much upon its origin as its content."

Likewise, this Court in the Hazel-Atlas case refused to appraise the influence exerted by the Clarke article or whether the Patent Office could properly have relied on it. The critical point, this Court stated, was that "Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published. \* \* They are in no position now to dispute its effectiveness." 322 U.S. at 247. Moreover, in Federal Communications Commission v. WOKO, Inc., 329 U. S. 223, this Court even more pointedly stressed the irrelevance of reliance upon fraudulent matters. In that case, where the Commission had refused to renew a license to operate a radio station because of false statements as to ownership of the stock, it similarly was urged that "the Commission failed to find that the concealment was of material facts or had influenced the Commission in making any decision, or that it would have acted differently" had it known the true facts. 329 U.S. at 226-227. The Court, however, brushed this contention aside as "beside the point. The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary

and served no purpose." 329 U.S. at 227. See, also, Federal Communications Commission v. Broadcasting Service Organization, Inc., 337 U.S. 901.

It would be singularly undesirable if the test of fraud on the Patent Office revolved about the materiality of the misrepresentations involved. In the first place, in order to protect applicants, proceedings in the Patent Office are necessarily secret and consequently the Office has to be able torely upon the integrity of the representations made by applicants and practitioners before it. In the second place, patents constitute "an exception to the general rule against monopolies and to the right to access to a free market" (Precision Instrument Co. v. Automotive Co., 324 U.S. 806, 816), and hence the possession and assertion of patent rights are "issues of great moment to the public." The Hazel-Atlas case, 322 U.S. at 246; Precision Instrument Co. v. Automotive Co., ibid. See also, Mercoid Corp. v. Mid-Continent Investment Co., 320 U. S. 661, 665; Morton Salt Co. v. Suppiger Co., 314 U. S. 488, 492-493; United States v. Masonite Corp.,

The failure of the court below in this case to accord precedential effect to principles laid down by this Court in the Hazel-Atlas case is even more marked than its action in the Broadcasting Service case, 171 F. 2d 1007, which was reversed per curiam by this Court. 337 U. S. 901. The Hazel-Atlas case, which established the applicable principles ignored by the court below, concerned the same transaction as here involved, not merely a similar set of facts.

316 U.S. 265, 278. Because of the exceptional nature of patents there is an uncompromising duty on all applicants and parties to Patent Office proceedings "to report to it all facts concerning possible fraud or inequitableness underlying the applications in issue." Precision Instrument Co. v. Automotive Co., supra, at 818.\* It is only by the imposition of such a rigid standard of honesty and integrity that that agency can "act to safeguard the public \* \* against fraudulent patent monopolies. Only in that way can the Patent Office and the public escape from being classed among the 'mute and helpless victims of deception and fraud.' Hazel-Atlas Glass Co. v. Hartford Empire Co., supra 246." Precision Instrument Co. v. Automotive Co., ibid.; cf. Federal Communications Commission v. WOKO, 329 U. S. 223.

The Commissioner's conclusion that the use of the Clarke article was fraudulent is the same as that of all courts—indeed all judges—other than the majority below, which have had this very transaction before them. *Hazel-Atlas* case, 322

In the Precision Instrument case an applicant for a patent failed to disclose to the Patent Office his information as to possible perjury in an application to which he was opposed in an interference proceeding. Instead, he entered an agreement with the opposer, in which the opposer conceded priority and assigned his application. This Court refused to enjoin infringement of the patents so obtained, since the patentee had not displayed the requisite standard of conduct. 324 U.S. at 819.

U. S. at 245-246, 250; 137 F. 2d 764, 766, 770 (C. A. 3); United States v. Hartford-Empire Co., 46 F. Supp. 541, 612 (N. D. Ohio). The evidence before the Commissioner included the same documentary material which was before the courts, and no credible oral testimony which weakened the force of the documents. Obviously, the Commissioner did not err in accepting the standards enunciated in these decisions. The court below was under an equal duty to follow them.

## B. THE EVIDENCE CONCLUSIVELY SHOWS THAT DORSEY PARTICIPATED IN THE PRAUD

Although the Commissioner—and the court below—were both bound by this Court's pronouncements as to what constituted fraud, he was required to base his findings as to the parties'

"To grant full protection to the public against a patent obtained by fraud, that patent must be vacated. "
such a remedy is not available in infringement proceedings, but can only be accomplished in a direct proceeding brought by the Government."

Pursuant thereto, the Government has brought proceedings to cancel the Peiler patent. United States v. Hartford-Empire Co., Civil Action No. 554, D. Del., filed March 28, 1945. With Hartford's consent, the District Court for the District of Delaware, on July 22, 1949, entered a judgment cordering Hartford to surrender the patent for cancellation ab initio.

The total effect of this "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals" (322 U. S. 245-246), this Court stated, "calls for nothing less than a complete denial of relief to Hartford for the claimed infringement of the patent thereby procured and enforced." 322 U. S. at 250. The Court went on (322 U. S. at 251):

participation in the fraud upon the evidence before him. This obligation he recognized (R. 41, 11).10

Although the majority of the court below was of the opinion that there was not "a shred of evidence" to support the Commissioner's finding that Dorsey was a knowing participant in the fraudulent scheme (R. 72), the evidence before the Commissioner was in substance identical with that on the basis of which both the Court of Appeals for the Third Circuit in the Hazel-Atlas case (137 F. 2d 764, 766, quoted at R. 38-39), and the district court in the antitrust case (United States v. Hartford-Empire Co., 46 F. Supp. 541, 612, quoted at R. 39-40), had declared that Dorsey had participated in the fraudulent scheme. Judge Edgerton, dissenting below, thought that the proof as to Dorsey was "conclusive" (R. 84), and District Judge Morris held that there

<sup>10 &</sup>quot;Although the question of fraud and deception by Hartford was in issue and a matter adjudicated in the cases mentioned in the orders to show cause, the respondents here were not parties individually in any of those cases and their personal guilt or innocence in connection with fraud chargeable to Hartford was not a direct issue in any of the cases.

<sup>&</sup>quot;Accordingly, the proceedings here were conducted as an original proceeding, placing in direct issue for the first time the questions of personal fraud and deception stated in the orders to show cause, and with full and complete opportunity accorded respondents, and each of them, to introduce any pertinent and relevant testimony and proofs they saw fit to introduce, and each respondent was accorded the right to cross-examine any and all witnesses called on behalf of any of the other respondents." (R. 41-42.)

was "ample and substantial" evidence to support the Commissioner's findings as to Dorsey's participation in the fraud (R. 32). We believe that the evidence set forth at length in the findings of the Committee (see supra, pp. 8-12; R. 36-68 et seq.) and in Judge Morris' opinion (R. 14-36 et seq.) proves this conclusively. It may be summarized as follows:

Dorsey was Hartford's Washington patent attorney as well as a member of the Hartford Board of Directors (R. 114, 115, 41). He was in charge of the prosecution of some of the more important of its patent applications under associate powers of attorney with Mr. William H. Honiss, who was Hartford's regular solicitor (R. 114-115). In 1925 Dorsey was working closely with Brown and Carter on a number of patent applications." Included among these applications was the Peiler application which was "one of the principal ones we had" (R. 116).

At that time, discussions were had, in which Dorsey participated (R. 42, 116-117), as to the

<sup>&</sup>quot; Brown testified (R. 123):

<sup>&</sup>quot;Q. Mr. Brown, during the years 1925 and 1926, is it not a fact that you and Mr. Dorsey and Mr. Carter were in frequent conference about the patent situation of the Hartford-Empire Company and the Owens-Illinois Company?

<sup>&</sup>quot;A. We had a great many conferences; yes.

<sup>&</sup>quot;Q. And you were working in close cooperation during these years, were you not, on the patent situation?

<sup>&</sup>quot;A. From time to time; Mr. Dorsey and I were together a good deal of the time. I probably spent two-thirds of my time in Washington during that period."

desirability of having an article prepared and signed by "some competent authority and placed before the Examiner" relating to gob feeders for filing in the Peiler application (Tr. 600). Brown, in December 1925, initially asked Carter, an official of Owens Illinois Bottle Company (whose full interest in Hartford's commercial welfare was at that time secret), to prepare the article "to be signed either by [him] or someone else" but Carter declined (Tr. 743 (Ex. C-70-1), Tr. 744 (Ex. C-70-2)). Shortly thereafter (early in January 1926) Hatch, who reported to and consulted with Brown as his superior officer in the Hartford organization on matters of policy affecting patents, commenced, with Brown's approval, the preparation of an article relating to automatic glass machines (Tr. 538, 474).

While Hatch did the major portion of the actual work, he consulted with Dorsey, among others, and he sent him a copy of the manuscript when he had completed it (R. 126-127). Dorsey admits that he read the article and that he suggested at least two changes in language (R. 162). The fact that his suggestions were so limited means only, as he admitted (R. 157), that the article otherwise met with his approval. There is nothing to indicate that he would not have suggested additional and more drastic changes if he thought them desirable for the purpose for which he intended to use it.

Long before the article was published Dorsey knew that it was contemplated using it in connection with the Peiler application provided it was published over the signature of "some apparently unprejudiced authority." See p. 41, infra. Dorsey stated in an affidavit (Ex. D-72-B, R. 157):

When the manuscript for the "Clarke Article" was presented to me [by Hatch], I found therein a true statement of such facts as I desired to present to the Patent Office

In explaining this affidavit to the Committee, Dorsey testified (R. 135-136):

A. It was a true statement of facts, but it was not the article that I wanted. Remember, Mr. Hatch had sent me the early manuscript. I saw things that might be good in it. I was going to file the Clarke article or any article that was published if it was good, but I didn't know what was going to be published.

Q. Do you wish now to retract your

statements in this affidavit?

A. I don't think I need to retract it. It was a true statement of facts which would be advisable to use in the Patent Office.

Q. Well, we may be talking at cross purposes, but as I understand this affidavit, it says that you recognized in the Hatch manuscript that it contained statements of such facts as "I desire to present to the Patent Office"?

- A. That is correct, it did contain statements of facts that I wanted to present to the Patent Office.
- Q. Well, didn't the Clarke article, as published, contain those statements of facts?

A. I don't remember how closely it followed the original draft that I saw. If the article was satisfactory as published, it was my personal intention to file it in the Patent Office. [Italics supplied.]

In addition, on May 20, 1926, two months before the article was published, Hatch wrote Dorsey in response to the latter's wire for a copy of the article (R. 149–150 (Ex. D–72–C)):

You flatter me again by wiring for a copy of the so-called "Maloney" article. I enclose one of the original drafts which I made and you will understand that Mr. Maloney will never appear in connection with this article in any way. Moreover, when the article appears in print, it will probably be changed considerably from the present form.

Clarke, of Toledo, the President of the American Flint Glass Workers' Union. Mr. Clarke also swallowed the labor bait which I had prepared for him and said he would be glad to revise and publish the article over his own signature if I would

get assurance for him that the Owens Company would not be offended. \* \* \*

\* Clarke said that he would rewrite the article to a considerable extent, I suspect, and publish it in the Trade Journals. I fear I may have to go out to Toledo again to get Clarke to show some speed in this matter and perhaps to supervise what he publishes. I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planted.

I will see that you get a copy of some Journal in which this article appears when

it comes out.

Incidentally, when I was feeling rather discouraged on getting the labor article published, I had the idea of getting Jack Arbogast to write a history of his father's connection with the glass business. I am told that Jack is more or less of a loafer but would be interested in any small sum he could pick up. I think that we could introduce the matter in which we are interested in such a history and I was quite amused to think such a history would of necessity be strongly anti-labor.

And in discussing this letter, Dorsey stated (R. 140):

\* I had returned to Mr. Hatch the draft I had received in March. It went a back to him. I didn't have anything. I was getting ready to amend the Peiler case, and I wanted to know what good I could gather out of the facts stated in that article.

Q. That is the reason you wired for this draft?

A. That is what I wanted it for, no doubt, because the case was up for amendment and writing new claims.

The article was published, as written by Hatch except for exceedingly minor changes, on July 17, 1926, after Hatch had impressed upon the publishers his desire to expedite the printing (Tr. 543).12 On June 23, 1926, (Ex. E. p. 220), prior to the actual publication, an amendment to the patent application had been prepared; this amendment, which was filed on July 31, shortly after the article appeared (ibid.), stated that "a discussion of the subject-matter of this case is being prepared, with affidavits and exhibits, showing the wide-spread recognition by the glass art of the novelty and great value of the features claimed herein . In order to hasten the prosecution of the case; the present amendment is filed without waiting for the additional matter referred to, which will be filed in a supplemental paper as promptly as possible" (id., at p. 226). This amendment, which obviously was in anticipation of the filing of the Clarke article, was signed by "Dorsey and Cole" (id., at 247). On October 11, 1926, the supplementary material was filed (id.,

<sup>&</sup>lt;sup>12</sup> Hatch's letter to the publisher stated "We would like to have the article appear as soon as possible and I think that Mr. Clarke will not insist on seeing a proof if it is going to take extra time." (Tr. 543.)

at 261-305). The documentary attachments were preceded by a summary statement, signed by "Dorsey and Cole" (id., at 261-265), which devoted most of two pages to describing and quoting from the Clarke article as describing the "revolution in the art produced by the suspended-charge feeders, referred to in the Clarke article as 'gob feeders'" (id., at 263). A reprint of the article was appended (id., at 303-305). Dorsey admitted that at his request a copy of the magazine containing the article was obtained and filed in the Patent Office record (R. 157-158), and that the article published was "connected" with Hatch's manuscript (R. 136):

Q. Your testimony, as I understand it, to this Board is that when you filed the Clarke article in the Patent Office, you connected it in no way whatever with the Hatch article?

A. Oh. it was connected. It was certainly connected. The Clarke article certainly had the basis of the manuscript that Hatch had sent me. There is no question about that in my mind. How close they were, I don't know.

Q. You made no effort to find out how

closely-

A. No. I didn't think it necessary. I couldn't see any reason for going in and finding out, and digging into a perfectly open thing, when the man had published it under his own me.

Q. Didn't you know that the article that was published in the name of William P. Clarke as author was, in fact, prepared by Hatch at the time you filed it in the Patent Office?

A. I didn't know that the article that was published by William P. Clarke was identically the same or, in substance, as the manuscript I had received from Hatch. On the contrary, Exhibit C, this letter from Hatch gave me fair notice that the article might be materially changed. There was no reason for my going in and chasing it up. I wouldn't have minded putting it in under affidavit if I had gotten it the other way.

Subsequently, Dorsey filed a brief in the Patent Office, in the appendix to which the article was again printed in full (Ex. E, pp. 509, 593-605), in which he stated (R. 119, Ex. E, p. 477):

That the appellant's feeders have been a tremendous success and have revolutionized the art' from the standpoint of economy is recognized by reluctant witnesses. We call attention to the article by William P. Clarke \* \* \*.

In regard to this brief, Brown testified that: "Mr. Dorsey and I spent a great deal of time on that brief" and that "I happen to remember that that particular paragraph which I have read was dictated by Mr. Dorsey in my presence." (R. 120.)

This evidence, which consists primarily of Dorsey's own statements and admissions, shows conclusively, we submit, that he was a knowing participant in the fraudulent scheme.<sup>13</sup>

The reasons advanced by respondent as to why the evidence does not show his guilt are baseless.

1. It is asserted that Dorsey didn't know anything about the plan or the article until he returned from Europe in April, 1926, that before then he had only discussed the preparation of an article or affidavit by Carter." But this pro-

<sup>14</sup> Dorsey's brief below stated (p. 12):

<sup>&</sup>quot; Dorsey has argued that the letter from Carter to Boshart (supra, pp. 10-11) and other statements of the other respondents introduced in evidence were not admissible against him. Since there is ample evidence apart from these statements to show his personal participation in the fraudulent scheme, it is not essential that the admissibility of these statements against him be determined. But the evidence was admissible as the statements of co-conspirators, inasmuch as a conspiracy between Dorsey and the other respondents was clearly proved by other evidence. Schine Theatres v. United States, 334 U. S. 110, 117; United States v. Gyprum Co., 333 U. S. 364, 393; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 249; Connecticut Mutual Life Ins. Co. v. Hillmon, 188 U. S. 208, 218. Cf. Krulewitch v. United States, 336 U. S. 440 This rule governs in civil as well as criminal cases, and has been specifically held applicable to, and given effect in, a disbarment proceeding. In re Gladstone, 28 F. Supp. 858, 860 (S. D. N. Y.).

<sup>&</sup>quot;In the fall of 1925 there was some conversation between Dorsey and Brown about putting into the Peiler file an article or affidavit supporting patentability. At that time they agreed that Mr. Henry Carter, an officer of the Owens Glass Company, which was a licensee under the Hartford patents, would be a fit one to prepare this." (R. 161–162.)

posal was no more innocent than that finally adopted. For Carter was an officer of Owens, the company which had developed and used the suction machines which were the primary competition to Hartford's gob feeders. Carter too would have been regarded as a "reluctant witness" in favor of the gob feeder (see Tr. 538), as long as the secret agreement between Hartford and Owens brought to light in the antitrust litigation, whereby Owens was to receive half of all royalties collected by Hartford under these very patents and applications, was not disclosed.

Whether Dorsey knew anything about the Hatch article until he returned from Europe is immaterial in any event in view of what he knew and did subsequently.

2. It is asserted that although Dorsey knew Hatch had written a draft of the article, and had done the spade work and the research, he assumed that the final article signed by Clarke was revised and rewritten by him, and did not know it to be the same paper that Hatch had written. In fact, the article as printed was identical with Hatch's draft except for a few minor changes in wording.<sup>16</sup> Dorsey had examined

<sup>&</sup>lt;sup>15</sup> See Hartford-Empire Co. v. United States, 323 U. S. 386, 393-395.

<sup>&</sup>lt;sup>16</sup> Clarke put in 18 words of his own, and deleted some citations and the last paragraph. See Ex. HB 1, Tr. 701-727, as explained in Tr. 93-100. He admitted that not a single sentence was his. Tr. 236. Carter's changes, as well as Clarke's, appear on the photostated Exhibit.

Hatch's draft in April 1926 (R. 162). He was sufficiently interested in the article to wire again for a draft in May (R. 140). In June he prepared the amendment stating that additional material would be submitted, and filed the amendment shortly after the article was published in July (see p. 33, supra). He filed and relied upon the article in October 1926, at which time he stated he believed it be truthful and correct (R. 132, 157, 162). This strongly implies that he read the article as published before filing it and was aware of its contents. Furthermore, Hatch's letter to Dorsey indicated some fear that, although Clarke "understood just what we want. published", he "might unintentionally destroy some of the propaganda which we planned", and stated that Hatch might have to go out to Toledo "perhaps to supervise what he publishes" (R. 150); this statement, plus the actual similarity between the draft and the article, put Dorsey on notice-if that were necessary-that the substance of Hatch's draft would be in the finished article.

Although Dorsey now admits that he knew only that the article was "connected" with Hatch's draft, it is obvious that at that time he must have known that they were in substance the same, whether or not he knew that they were practically identical. It was admittedly his intention to file it if it was "satisfactory as published" (supra, p. 31, R. 136), by which obviously

was meant if the substance of Hatch's draft remained unaltered. His subsequent efforts as a highly interested witness to minimize his knowledge of the similarity were not credible, and were not credited by the committee of seven who heard him testify.

3. This becomes obvious in the light of the purpose of the scheme. Dorsey now asserts that there was no thought of using the article in the Patent Office until the text of the article as published under Clarke's name became available. If Dorsey knew whose article it really was when he submitted it to the Patent Office as the statement of "a reluctant witness," it would not be material whether the plan had matured earlier. But there can be no doubt that it did.

In an affidavit prepared in 1941, Dorsey stated (R. 157):

When the manuscript for the "Clarke Article" was presented to me, I found therein a true statement of such facts as I desired to present to the Patent Office.

And he admitted in the colloquy quoted supra, pp. 30-31, that the Hatch manuscript contained "statements of facts that I wanted to present to the Patent Office" (R. 135). Subsequently, he wired Hatch for a copy of the article. Hatch's reference to "the propaganda which we planned" (R. 150) does not sound as if Dorsey wanted the article merely to "know what good I could gather out of the facts stated" (R. 140). Indeed,

Dorsey admitted in cross-examination that "if the article was satisfactory as published, it was my personal intention to file it in the Patent Office" (R. 136). Hatch's letters to Dorsey" and Carter also make it clear that the article was prepared for a specific purpose and was intended to be used; there is no place it could have been used at that time except in the Patent Office.

Hatch's letter to Dorsey also shows that Hatch was anxious to insure the speedy publication of the article, and that Hatch said that he would get Dorsey a copy when the article came out (R. 150). See also p. 32, supra. If all Dorsey had wanted was the "facts" set forth in the article, as distinct from the article itself, this would not have been necessary. Dorsey admits that "At my request, a copy of the National Glass Budget containing the said article, authenticated by an affidavit of the publisher, was obtained and filed in the record of the above-identified Peiler application" (R. 157-158).

And then, as Brown testified, Dorsey dictated the paragraph in the brief calling attention to the article as that of a reluctant witness, giving

<sup>&</sup>lt;sup>17</sup> I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planned" (R. 150).

of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print" (R. 45, 149).

tribute to the Peiler feeder as having "revolutionized the art" (R. 119-120).

From the facts set forth above it is obvious that Dorsey knew all about the scheme from the beginning. Hatch so stated, as appears from the following (R. 167 (HB Ex. 67, pp. 3099-3100, 3111)):

Q. Who besides Mr. Carter did you tell that the purpose that you had in mind that the article should be printed under the name of some apparently unprejudiced authority?

A. I told all of those who were associated in my company.

Q. I see, did you tell Mr. Dorsey about it; you mentioned Mr. Dorsey's name before?

A. Yes.

Q. Now, you testified before the recess that Mr. Dorsey knew what was going on; am I correct in my recollection?

A. He did, yes sir.

In short, Dorsey admits that he edited the article, that he wired for a draft of it, that he had

The testimony quoted appears in HB Ex. 67; which is the complete testimony of Hatch in the Hartford-Empire antitrust case. This exhibit was introduced by Hatch himself as a part of the disbarment record, and he adopted "the testimony given before the court at Toledo as part of [his] testimony here" (Tr. 472-473). Hatch was subject to cross-examination by Dorsey on the day following the introduction of this exhibit (R. 128).

it filed in the Patent Office, and that his brief described it as the work of an unprejudiced witness. These facts alone establish his participation in the scheme to deceive the Patent Office. His denials that he knew that the Hatch draft was the same as the published article, and that he was aware that the publication was pursuant to a plan to deceive the Patent Office were not only unbelievable, but contrary to the testimony of other witnesses friendly to him. Finally, we submit that whether or not Dorsey was in on the scheme to deceive from the beginning, his misconduct is established by his brief filed in the Patent Office if at that time he knew that the article was in substance the one written by Hatch. For the brief was the document which was designed to complete the deception of the Patent Office as to the authorship of the article.

# C. THE SCOPE OF JUDICIAL REVIEW OF THE COMMISSIONER'S ORDER OF DISBARMENT

Inasmuch as the evidence conclusively shows that Dorsey has participated in the perpetration of a fraud on the Patent Office, the disposition of the case does not depend on the scope of judicial review under 35 U.S.C. 11. For whether the substantial evidence rule, the clearly erroneous rule or trial de novo be the standard for judicial review, the decision of the Patent Office is correct and should be affirmed. That the Patent Office was right and the court below wrong—ir-

respective of the scope of review—has been shown in the preceding portions of this brief.

This Court may, however, feel it necessary to determine the proper scope of judicial review in order properly to perform its own function in this case. And since the majority below dealt with the point at some length and came to what we believe to be an erroneous conclusion, a discussion of the question seems advisable.

The holding of the majority below as to the scope of review is not entirely clear. At one point (R. 75) the court refers with approval to its practice in reviewing District Court disbarment cases of examining "the case de novo", and states that the District Court should do "no less to insure due process of law in reviewing cases of disbarment from the Patent Office". Further on, on the same page, the opinion refers to Section 10 (e) of the Administrative Procedure Act, we believe erroneously, as permitting the court to "review the whole record of the proceedings had below for the purpose of ascertaining any prejudicial error" (R. 75). The court later refers to that statute as requiring "substantial probative evidence" to support administrative findings (R. 75-76), and at another point the court stated that "the review contemplated was a full judicial review just exactly like that of any other case where judicial review is provided" (R. 75). And the court on several occasions indicated its disapproval of "the doctrine of 'administrative finality', which might better be known as 'administrative infallibility'" (R. 73, 75).

Although these phrases do not indicate too clearly what test the majority below has held to be correct, a reading of the opinion as a whole indicates reasonably plainly that the court did in fact review the evidence de novo without giving any weight to the findings of the Patent Office, and also that, whatever the scope of review, the court would have regarded the Patent Office findings as not supported by sufficient evidence. See R. 72 ("not a shred of evidence"), R. 76. Judges Edgerton and Morris were of the view that the substantial evidence rule was applicable, a position which, we submit, is correct. A third and intermediate position is that the substance of the "clearly erroneous" test governing the review of lower court decisions under Rule 52 (a) of the Rules of Civil Procedure might govern-an approach which we shall show is the only reasonable alternative to the substantial evidence rule. And under Rule 52 (a), the "clearly erroneous" principle unquestionably controls the review of District Court decisions by the Court of Appeals.

1. The statute and its history do not define the scope of review.—The controlling statute, 35 U.S. C. 11, is not of much help. It provides that:

The action of the commissioner may be reviewed upon the petition of the person.

so refused recognition or so suspended or excluded by the district court of the United States for the District of Columbia under such conditions and upon such proceedings as the said court may by its rules determine.

This does not specify the scope of review, although the word "review" in itself may be said to suggest that the matter decided by the Patent Office was not to be examined de novo. The District Court only recently promulgated a rule under this section which states that the record before the Patent Office "shall constitute the sole basis for the court's review", which also implies the ordinary procedure for reviewing administrative decision, but does not, of course, define the scope of review.

On June 26, 1945, the District Court for the District of Columbia ordered its Local Civil Rules amended to add to Title VIII the following rule:

"RULE 95. Review of Orders as to Admission and Exclusion of Practitioners before Patent Office.—A person refused recognition to practice or suspended or excluded from practice before the Patent Office may file his petition in this court against the Commissioner of Patents for a review of such action within thirty days after date of the order recording the Commissioner's action, or if the action was taken within a period of ninety days before adoption of this rule the petition shall be filed within thirty days thereafter. An answer shall be filed within twenty days after service of summons. Upon filing of the answer, or in default thereof, the Clerk shall certify the case to the Assignment Commissioner, who shall promptly assign it for hearing before a justice of the court. Prior to the time for hearing the petitioner shall file a certified copy of the record and proceedings before the Patent Office, which shall constitute the sole basis for the court's review."

The history of the statute is also not very enlightening. An 1861 law (Act of March 2, 1861, 12 Stat. 246) subjected disbarment orders of the Patent Office to the approval of the President. The Act of July 8, 1870 (R. S. 487, 16 Stat. 200), transferred the power of approval to the Secretary of the Interior, in whose department the Patent Office then was located. United States ex rel Wedderburn v. Bliss, 12 App. D. C. 485, held that the Secretary need not hear oral argument, but that he was at most a kind of "appellate tribunal".

The statute was amended in 1922 (42 Stat. 390, 35 U. S. C. 11) so as to substitute review by a district court for the approval of the Secretary. The history of this amendment contains no reference to the scope of review. Nothing in the legislative reports or debate indicates whether the courts were to have the same authority as the Secretary of the Interior, or whether the courts were to review orders of the Commissioner of Patents in the same way in which they customarily review other administrative orders.

2. The scope of review should be that applied by the courts to, and approved by the Administrative Procedure Act for, administrative action generally.—In the absence of any expression manifesting a contrary intention, we think that the scope of review should be that traditionally applied to administrative decisions—in other words, the substantial evidence rule which requires ad-

minstrative findings to have a rational basis in the record as well as in law. Cf. Rochester Telephone Corp. v. United States, 307 U. S. 125, 146.

That test did not originate in specific statutory form, but found its primary development in suits to set aside orders of the Interstate Commerce Commission. Although the courts are given jurisdiction to set aside orders of that Commission, 28 U. S. C. 2321, the scope of review of Commission findings has not been prescribed by Congress, a situation comparable to that here. Early decisions declared that the courts had power to set aside Commission decisions only if they were beyond the power of the Commission, and thus "contrary to law." Interstate Commerce Commission v. Louisville & N. R. R., 227 U. S. 88, 92; Interstate Commerce Commission v. Union Pac. R. R., 222 U. S. 541, 547. In the Louisville & N. R. R. case, "a finding without evidence" was held to be "beyond the power of the Commission," and "an order based thereon contrary to law." In the same case, at p. 94, the Court stated that its duty was to "examine the record with a view of determining whether there was substantial evidence to support the order."

In the following year the test was embodied in the Federal Trade Commission Act (38 Stat. 719, 720, 15 U. S. C. 41, 45); the statutory phrase "if supported by evidence" is similar to the phrase employed by the Court in the *Union* 

Pacific case shortly before—"when supported by testimony." n Since that time the substantial evidence test has been given general application in reviewing administrative decisions so long as no other standard was prescribed by statute. And this has been so whether a statute provided for judicial review but did not define the scope of review, as in the Interstate Commerce Commission cases and Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 442, and Rochester Telephone Corp. v. United States, 307 U. S. 125. as well as the statute here involved, or did not provide for any judicial review at all, as in · Shields v. Utah Idaho Central R. Co., 305 U. S. 177.

The substantial evidence rule was recently given legislative approval as a general test to be applied throughout the field of judicial review in the Administrative Procedure Act (60 Stat. 237, 243, 5 U.S.C. 1009), which provides in Section 10 (e) that agency action may be set aside if "unsupported by substantial evidence" on the record of an agency hearing provided by statute." 22

n An article by Dean Stason indicates that his examination of the congressional debates on the Federal Trade Commission Act led him to the conclusion that the Interstate Commerce Commission cases "were firmly in the minds of the members of the Congress when the [former] Act was adopted." Stason, "Substantial Evidence" in Administrative Law, 89 U. of Pa. L. Rev. 1026, 1040-1044 (1941).

<sup>&</sup>lt;sup>22</sup> In a predecessor to the Administrative Procedure Act vetoed by the President (H. R. 6324, 76th Cong., 3d sess., 86 Cong. Rec. 13942), the House expanded the scope of review

The language following the words "substantial evidence" does not appear to change the rule, although it may clarify its meaning." The reasoning of the court below in this case to the effect that the Administrative Procedure Act supports its theory of review is difficult to follow, to say the least. The statute proves precisely the contrary.34

to include the clearly erroneous test (86 Cong. Rec. 4669-71, 4742-44), but the Senate rejected the change (id., at 13676, 13746-13748), and the House concurred in the Senate pro-

vision (id., at 13809, 13815-16).

3 Jaffe, Administrative Procedure Re-examined: The Benjamin Report (1943) 56 Harv. L. Rev. 704, 732-33; Stason, "Substantial Evidence" in Administrative Law (1941) 89 U. of Pa. L. Rev. 1026, 1035-1050. This question appears to have been left open by this Court's decision in National Labor Relations Board v. Pittsburgh Steamship Co., 337 U. S. 656. A complete treatment of the point does not seem essential

to the present discussion.

"It is doubtful whether Section 10 (e) applies to disbarments by administrative agencies. Section 6 (a) of the Act (5 U. S. C. 1005 (a)) provides: "Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding." In addition, the legislative history shows that Congress intended to keep unchanged the agencies' existing powers to regula a practice before them. Hearings before the House Committee on the Judiciary, 79th Cong., 1st sess. on H. R. 1203, p. 34; S. Doc. 248, 79th Cong., 2d sess., p. 80; S. Doc. 248, 79th Con., 2d sess., pp. 401-405. Accordingly, in the absence of express provision for judicial review, as is true for all administrative disbarment except in the Patent Office (see infra, p. 50), judicial review of administrative disbarment would seem still to be restricted solely to the question of due process.

Goldsmith v. Board of Tax Appeals, 270 U.S. 117.

We thus have a general rule as to the scope of judicial review applied by the courts in the absence of a different legislative directive before and after 1922, and approval by Congress both before and since. Only when Congress has specified that the scope of review should be different have the courts so held.<sup>25</sup> The statute here involved provides for review, but does not define its scope. The clear inference is that Congress would expect the customary rule to be applied.

3. No different rule is required for disbarment.—The fact that this case involves the right of an attorney to practice before an administrative agency does not require the application of any different rule. In the absence of statute it is settled that administrative agencies have authority to regulate the right of attorneys to practice before them, and that the refusal of such a right is subject to review only to the extent of ascertaining whether there has been a lack of due process. Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 123, and cases cited. The Patent Office is one of the few agencies specifically given power to disbar. The provision for "review" of its decisions-not trial de novo-would not seem to be an adequate basis for making its orders as to disbarment much less consequential than the orders of other agencies.

Report of the Attorney General's Committee on Administrative Procedure (1941), p. 90.

The reference to judicial decisions by respondent (Reply Brief p. 5) and the court below (R. 75) is not helpful, inasmuch as the state appellate courts cited were not reviewing administrative action. They were dealing with appeals from lower courts, and rules as to administrative finality, of course, did not apply. And it should be noted that the federal appellate courts have ordinarily exercised great restraint in reviewing the disbarment orders of the federal district courts.26 The power to disbar is regarded as involving the exercise of sound discretion by the trial court, and its disbarment order will be upset "only on a showing of abuse of discretion or great irregularity." In re Claiborne, 119 F. 2d 647, 651 (C. A. 1); In re Spicer, 126 F. 2d 288, 289 (C. A. 6); In re Schachne, 87 F. 2d 887, 888 (C. A. 2); In re Chopak, 160 F. 2d 886, 887 (C. A. 2), certiorari denied, 331 U.S. 835. Indeed, this Court initially doubted that it had the power to review disbarment proceedings. Ex parte Burr, 9 Wheat. 529 (Marshall, C. J.); see also, In re Ulmer, 208 Fed. 461, 467 (N. D. Ohio) and cases cited. And even where such power existed, Chief Justice Marshall has admonished (9 Wheat. at 530):

\* \* \* it is extremely desirable that the respectability of the bar should be

The scope of review in such cases would seemingly be governed by the "clearly erroneous" rule contained in Rule 52 (a) of the Federal Rules of Civil Procedure. See *infra*, pp. 54-56.

maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. If there be a revising tribunal. which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case. preme] Court is not inclined to interpose, unless it were in a case where the conduct of the circuit or district court was irregular, or was flagrantly improper.

See Ex parte Wall, 107 U.S. 265.

It has been argued that administrative disbarment cases should not be governed by the administrative finality rule as to the scope of review because such matters do not lie within the special field of administrative competence. There would be more force to this contention if questions as to the propriety of an attorney's conduct were determined without relation to the functions of the particular agency, or to the special problems coming before it. But that is not so, as the present case indicates. Practitioners before the Patent Office have a special obligation, for that Office does not occupy the position of adversary or litigant filled by other administrative bodies. As

the Patent Office Committee stated in its opinion in this case (R. 65):

By reason of the nature of an application for patent, the relationship of attorneys to the Patent Office requires the highest degree of candor and good faith. In its relation to applicants, the Office does not occupy the position of a party litigant; it must rely upon their integrity and deal with them in a spirit of trust and confidence; and, as a quasi-judicial tribunal, it acts in a sovereign capacity to grant them valuable property rights when these are once established.

It is a high duty and privilege to ascertain and define such rights—a duty which entails heavy responsibilities and devolves upon the attorneys as well as upon the Office, although in different degrees.

The great value of the privileges which the Patent Office grants, the need for protecting the public against abuse of the privilege, and the non-adversary nature of patent applications make observations of the highest ethical standards by Patent Office practitioners particularly essential.

Furthermore, an understanding of specialized Patent Office procedures, and, to a considerable extent, of the technical subject matter involved may often be necessary in judging the propriety of an attorney's conduct. Even in this case, where the basic deception was easy to see, knowledge of the nature of the various types of gob feeders and familiarity with Patent Office rules,

files and records and the chronology of Patent Office procedures are helpful to a full understanding of the scheme. Other cases in which an attorney may be more skillful or subtle in concealing his misconduct may require greater familiarity with technical matters. Accordingly, we submit that the Patent Office has a special competence in determining the propriety of the conduct of those who practice before it, not substantially different from the general expertness of administrative agencies in their specialized fields.

4. Even if the substantial evidence rule is not controlling, the findings of the Patent Office officials, who heard the evidence, must be given great weight and not set aside unless clearly erroneous.-In the absence of any restriction upon the scope of review, appellate courts have long accorded great weight to the findings of the person or persons who actually see and hear the witnesses. The reasons for this are too well known to require greater elaboration than reference to the advantages which such a trier of facts has in determining questions of credibility over judges who can merely read the printed record. Thus, although before the Rules of Civil Procedure appellate courts in equity theoretically considered an appeal de novo (though on the record made below), many cases established that the findings were to be accepted unless clearly wrong. See United States v. Gypsum Co., 333 U. S. 364, 395; District of Columbia v. Pace, 320 U. S. 698, 701-702; Note to Rule 52, Federal Rules of Civil Procedure (H. Doc. No. 588, 75th Cong., 3d sess.), and cases cited therein. The rule as it existed in the prior equity practice (*ibid.*) was embodied in Rule 52 (a), which reads as follows:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The same standard for review of a master's findings appears in Rule 53 (e) (2).

Thus, the "clearly erroneous rule" in Rule 52 (a) is a restatement of the test which the courts had previously established for reviewing the findings of fact of a lower tribunal. Although Rule 52 (a) does not, as a matter of law, apply to the review of administrative findings under 35 U.S. C. 11, it would seem clear that these findings must at least be accorded the weight which the courts have traditionally given to the findings of the person who hears the witnesses—which is the test embodied in that rule.

Accordingly, we submit, if the Court does not accept our contention that the substantial evidence rule governs review in cases under 35 U. S. C. 11, the proper scope of review must be the equivalent of what is embodied in Civil Rule 52 (a). And this would be so even if the review is described as "de novo," since even in

such circumstances, the advantage of the person who actually hears the testimony is always recognized.

- 5. The District Court's findings .- In the normal case, under Rule 52 (a), the Court of Appeals would also be bound to accept the findings of the District Court "unless clearly erroneous" even though the District Court did not have the advantage of hearing the witnesses-although the latter fact might warrant giving the District Court's findings less weight than those of the Patent Office. In the present case, however, the District Court applied the substantial evidence rule in evaluating the findings of the Patent Office. If this was the right test, as we believe, the District Court's decision must be given effect, since not clearly erroneous. But if the District Court applied the wrong test, neither this Court nor the court below would be bound by its analysis of the facts.
- 6. Conclusion.—(a) We submit that the Patent Office findings should be accorded the same weight as those given administrative findings generally; they should be reviewed under the substantial evidence rule."
- (b) If not, the findings should be given the weight traditionally accorded the findings of the

<sup>&</sup>lt;sup>27</sup> As indicated above, we do not concede that the Administrative Procedure Act has modified that rule properly understood, but in any event we mean the rule as stated in that statute.

person who hears the oral evidence—i. e., the clearly erroneous rule.

(c) Even if the Court should review the record entirely de novo, without regard for the administrative findings, the evidence conclusively establishes Dorsey's gross misconduct, and justifies the order barring him from practice before the Patent Office.

### II

THE PROCEEDINGS BEFORE THE PATENT OFFICE IN NO WAY DEPRIVED DORSEY OF DUE PROCESS OF LAW

The court below has held that in the proceedings before the Patent Office, Dorsey was deprived of the due process of law to which he was entitled. Goldsmith v. Board of Tax Appeals, 270 U.S. 117; Ex parte Robinson, 19 Wall, 505, 513; Garland v. United States ex rel. Stevens, 32 App. D. C. 109, 136. The court found that the proceedings in the Patent Office leading up to the disbarment order so far failed to accord Dorsey due process of law as to constitute a "kangaroo court" (R. 72) and a "classic exemplification of a citizen being deprived of a valuable right without due process of law or indeed without process of law of any kind except bureaucratic 'lynch law'" (R. 69). This characterization of the Patent Office proceedings was utterly unjustified, for it is plain on the face of the record that, far from there being any denial of due process of law, Dorsey was accorded a fair hearing after having received adequate notice of the charge which he was called upon to answer and for which he was ordered disbarred. "The proceedings were properly conducted \* \* [Dorsey's] fraud was fairly charged, proved, and found" (R. 84) (Judge Edgerton dissenting).

### A. DORSEY HAD A FAIR HEARING BEFORE THE PATENT OFFICE

The holding of the court below that Dorsey was denied a fair hearing in the proceeding before the Patent Office was predicated on its findings (1) that the record does not show how Dorsey's case was consolidated with that of the other practitioners (the court below characterized the consolidation as "shot-gun joindure" (R. 78) resulting in "simply a record of mob procedure" (R. 77)); and (2) that the burden of disproving the allegations against him was improperly imposed upon Dorsey. Neither of these findings has any warrant in the record.

1. The consolidated hearing.—As to the consolidation of Dorsey's case with those of the three other practitioners involved, it is to be noted at the outset that Dorsey has at no time during the proceedings ever questioned the propriety of consolidating his case with those of the three other practitioners similarly charged nor has he ever urged that his consent to such consolidation, if necessary, had not been given. The court below, while recognizing that Dorsey had not questioned the consolidation, and even reproducing a portion

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of his brief wherein he affirmatively accepted the consolidation of the four cases for the purpose of making a joint record, refused to accept that "a lawyer of the admitted experience and ability of [Dorsey] would deliberately and voluntarily have verbally agreed to waive his rights" (R. 78). Accordingly, since "under the circumstances it could only be done by consent and stipulation" (R. 77), and since "a painstaking examination of the record has failed to reveal to this court either the specific terms of any such stipulation or the purport thereof" (R. 77-78), the court condemned the proceeding as a "shot-gun joindure" and the record as "simply a record of mob procedure" (R. 77, 78).

But the following colloquy plainly shows that before the introduction of any testimony, Dorsey, who then was appearing pro se, explicitly consented to the combining and making of a consolidated record (R. 109-110):

The CHAIRMAN. Shall we go ahead with our proof? I was going to ask if there was any objection to our combining and making a consolidated record.

Mr. Dorsey. Except, your Honor, I would like my testimony to come in by itself, because it is such a small part of the enormous picture. I would like an opportunity to present my case by itself anywhere in their case that it fits in.

Mr. Goodrich. May we work that out? The Chairman. Yes.

Mr. Goodrich. I am sure we can adjust that between us.

Mr. Brown. Mr. Dorsey, the testimony of these other men so far as it affects you will be part of your case.

Mr. Dorsey. Yes, but so far as I know they can't say anything about me, because I didn't see them.

Mr. Brown. But if there is anything about you—

Mr. Dorsey. Oh, yes; it is sworn testimony, and I have an opportunity to cross-examine.

Mr. Goodrich. I think we all understand that although we have four cases here, there will be but one record.

The CHAIRMAN. Yes.

Subsequently, Dorsey, in discussing the method of examining witnesses and introducing exhibits, further indicated his acceptance of the making of the joint record (R. 110-111). He never objected to the consolidation.

Moreover, even in the absence of express consent, it would have been entirely lawful in the interest of trial convenience to have consolidated the cases for the making of a joint record; inasmuch as the cases arose out of the same transaction and involved many of the same questions of fact. Cf. Rule 20 of the Federal Rules of Civil Procedure.

2. The burden of proof.—The record equally clearly reveals the unsoundness of the holding below that the burden of proof was imposed upon

Dorsey and that he was required affirmatively to disprove the allegations against him (R. 72). The Department of Commerce offered the findings of the District Court in the antitrust case (46 F. Supp. 541, affirmed, 323 U.S. 786), and the opinions of the Court of Appeals for the Third Circuit and of this Court in the Hazel-Atlas case (137 F. 2d 764, 765, 322 U. S. 238). The Committee admitted the documents as "the basis for these rules to show cause" but stated that "they are not admitted as proof of anything stated in them". Tr. 19-20. See also R. 100. In addition, the Department of Commerce introduced as exhibits the records before this Court in the Hazel-Atlas case and in the related Shawkee Mfg. Co. v. Hartford-Empire Co., 322 U. S. 271 (No. 423, October Term, 1943); these were received in evidence with consent of the parties only "to the extent that they contain wriften evidence in the form of admissions and certain other papers hereinafter identified as having been signed, sent, or received by these respondents as they purport to have been." (R. 41, 106-107.)\*\*

These materials constituted the entire case introduced against respondents, and in the absence of explanation plainly established at least a prima

During the proceedings it was stipulated on behalf of the practitioners other than Dorsey that letters included in these records were written, sent, or received as indicated by the letters. These letters, however, were not to be accepted as proof of the facts stated therein, except as they contained admissions by the writers thereof (Tr. 462, 522, 634).

facie case that fraud had been perpetrated on the Patent Office in regard to the preparation and filing of the so-called Clarke article and that Dorsey and the other practitioners involved had participated therein. The effect of this prima facie case was, as all parties understood, to shift to the respondents the burden of coming forward with the introduction of evidence to rebut it. Respondents did not at that time object to the procedure. The attorney for two of them expressly agreed to it: "The burden is on the respondents. All right. We will take it. We are here for that purpose, to meet that burden. We want to meet it in an orderly, legal way, according to the rules of procedure" (R. 98). Dorsey did not dissent. Indeed, he stated that since "we reached the conclusion there was no redress for us until charges were preferred, when we would I welcome have a chance to answer. these charges." (R. 100.) The remaining evidence in the record (all of the oral testimony and most of the exhibits) was introduced entirely by the respondents.

Although the burden of going forward to rebut the prima facie case was thus shifted to respondents, the burden of proof on charges set out in the show cause orders was not so shifted. The Committee on Enrollment and Disbarment did not hold that any such burden had been imposed upon respondents, nor did it recommend that the

Commissioner take any action excluding Dorsey from practice before the Patent Office because Dorsey had failed to sustain that burden, as the court below held (R. 72). On the contrary, the Committee, without reference to the burden of proof, concluded-and the dissenting judge below agreed (R. 84)—that "the record indubitably and conclusively shows and establishes that the respondents and each of them has been guilty of gross misconduct toward the Patent Office" (R. 66). In these circumstances, even if the Committee had imposed the burden of proving innocence on respondents, the impropriety of that ruling has been rendered harmless by the conclusive nature of the evidence as to the perpetration of the fraud and Dorsey's participation therein."

<sup>39</sup> It is apparent from the record that the respondents considered that they were receiving a fair hearing from the Committee. Dorsey, who was appearing pro se, absented himself from one hearing with the message delivered to the Committee by one of the other counsel that "so far as he is concerned, we may proceed in his absence" (Tr. 128). In addition, counsel for two of the respondents, apparently speaking for all, suggested that a witness be seen privately "without us there" (Tr. 124). Subsequently, he further suggested that the chairman constitute himself a committee of one to go to see the proposed witness. "I think frankly that if he is interviewed you yourself should do it, and do it alone and not take anyone from either side with you, or anyone else" (Tr. 128). The fact that this suggestion was not acted upon serves to emphasize that the Committee was according respondents a fair hearing.

B. DORSEY WAS GIVEN ADEQUATE NOTICE OF THE MATTERS FOR WHICH HE WAS ORDERED DISBARRED

The further holding of the court below that Dorsey was not given adequate notice of the charges against him also has two facets. First the court below found that there was a fatal discrepancy between the charge in the show cause order in regard to the filing of the Clarke article in the Patent Office and the charge of which he was found guilty. In its view, the charge noticed in the show cause order was that of having falsely represented Clarke to be the author of the article whereas the district court, the court below noted, had found that "the critical point [of the Patent Office finding of gross misconduct] is that it was material in the consideration of such article to know that it was substantially prepared and published by those interested in securing the allowance of the broad claims of Peiler" (R. 80). This "critical" point, the court below held, was not encompassed by the "specification" of the show cause order "nor can it be construed as broad enough to cover it" (R. 80). Secondly, the court below found that the disbarment was predicated in new counts not specified in the show cause order; i. e., that he had participated in the use of the Clarke article in the subsequent proceedings in the Court of Appeals for the Third Circuit, and in Hartford's payment of \$8,000 to Clarke in 1932. These rulings are likewise without substance.

1. There was in fact no prejudicial discrepancy between the charge as noticed and as found. The charge that Dorsey had falsely represented that Clarke was the author of the article implicitly also charged the improper concealment of the participation of Hartford's employees in the preparation of the article. The two are merely opposite sides of the same coin, i. e., the true state of the facts in regard to the preparation of the Clarke article. This is clear from the conclusion of the Committee on Enrollment and Disbarment. It specified as elements of respondent's gross misconduct "the deliberate concealment from the Patent Office of the facts that (a) the so-called Clarke article was prepared by and on behalf of Hartford; (b) that the sponsorship of the article by Clarke and the notation thereon of Clarke's name as author was procured by and on behalf of Hartford" (R: 66); and it concluded from these that "in the perpetration of such concealment all of the respondents \* \* connived . \* \* with the intention of misleading and deceiving the officials of the Patent Office as to the true state of the said material facts concerning the connection of Hartford with the preparation and publishing of the article with Clarke's name appearing thereon as the author thereof, when in fact he was not the true author thereof." (R. 66.) The district court's formulation of the "critical point" merely stated the charge as made and found in alternative terms.

Moreover, even if there had been a discrepancy, it would not have involved a failure to give adequate notice in a proceeding to disbar a practitioner from practice before an administrative agency such as the Patent Office. The court below, in holding that it did violate due process, was giving effect to the assumption which underlies its opinion in this case that the disbarment here will operate to prevent Dorsey from practicing law generally and that a proceeding leading to such a result is criminal in nature. The fact is, as the dissenting judge pointed out, "the term disbarment, though convenient, is not exact. The order of the Patent Office not forbid [Dorsey] to hold himself as a lawyer, advise clients and appear in courts. [It] exclude[s] him from practice before the Patent Office" (R. 83). Even where the disbarment order does operate to disqualify the attorney from practice generally, it is well-established that "The proceeding is in its nature civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practise in them." Ex parte Wall., 107 U. S. 265, 288; Randall v. Brigham, 7 Wall. 523, 541; In re Spicer, 126 F. 2d 288, 289 (C. A. 6); Hertz v. United States, 18 F. 2d 52, 54 (C. A. 8); Ex parte Burr, 4 Fed. Cas. No. 2186, p. 796. It is also well-established that the notice given of the

proceedings need not spell out with the specificity of a criminal indictment the nature of the charges involved. "The proceedings for such discipline need not comply with all the formalities of process or other trial procedure. The informality by which action is taken, the charges made, or the notice given to the attorney charged with misconduct will not invalidate the proceedings. It is sufficient if the attorney has notice of the charges against him and an opportunity to prepare and present his defence." In re Claiborne, 119 F. 2d 647, 650 (C. A. 1); see, also, Ex parte Wall, 107 U. S. 265, 271; Randall v. Brigham, 7 Wall. 523, 539; Thatcher v. United States, 212 Fed. 801, 806 (C. A. 6); United States v. Parks. 93 Fed. 414 (C. C. D. Colo.); Ex parte Steinman and Hensel, 95 Pa. St. 220; cf. Conley v. United States, 59 F. 2d 929, 935 (C. A. 8); United States v. Hicks, 37 F, 2d 289, 292 (C. A. 9). In these circumstances, an insubstantial discrepancy such as that apparently perceived by the court below in a disbarment proceeding of only limited effect clearly does not constitute a violation of due process.

2. Dorsey's disbarment was not predicated on his having participated either in the use of the Clarke article in the Court of Appeals for the Third Circuit or in Hartford's payment of \$8,000 to Clarke in 1932. The Committee found that Dorsey had been (R. 66):

guilty of gross misconduct toward the Patent Office in connection with the so-called Clarke article, the most salient points of said misconduct being: First, the preparation and the presentation of the article to the Patent Office in such a manner as to induce the Patent Office officials to believe that the article compared the commercial success of the specific invention of the Peiler application with the commercial success of the Owens machines, whereas, in truth, the comparison was of the commercial success of gob feeding machines in general-of which there were several types other than Peiler's-with the commercial success of the Owens machines; and, Secondly the deliberate concealment from the Patent Office of the facts that (a) the socalled Clarke article was prepared by and on behalf of Hartford; (b) that the sponsorship of the article by Clarke and the notation thereon of Clarke's name as author was procured by and on behalf of Hartford, and (c) that the publication of the article in the National Glass Budget was procured by Hartford and on its behalf through Hatch. We hold and believe that in the perpetration of such concealment all of the respondents deliberately collaborated not only with each other but also directly or indirectly with Clarke, and that all of the respondents connived with each other with the intention of misleading and deceiving the officials of the Patent Office as to the true state of the said material facts

concerning the connection of Hartford with the preparation and publishing of the article with Clarke's name appearing thereon as the author thereof, when in fact he was not the true author thereof, and all this for the purpose of securing favorable action by the Patent Office with respect to the claims in the Peiler application.

There is nothing in these findings in any way supporting the holding below that Dorsey (or any of the respondents) was disbarred for participation in the use of the Clarke article in the Third Circuit litigation or in the \$8,000 payment to Clarke.

In the first place, it is to be noted that the Committee did not find that Dorsey had participated in these subsequent events (R. 54-60). On the contrary, it specifically noted that they concerned "all of the respondents except Dorsey" (R. 55).

Even apart from this, the vice of the holding below stems from the court's reading of the Committee's discussion of the payment to Clarke in 1932 (R. 54-60) and of the use of the Clarke article in the Third Circuit litigation (R. 55) as equivalent to additional charges. But, as the

This misreading by the court below of the Committee's findings lies at the basis of its statement: "So far as we have been able to find never before in the history of the country has a subordinate committee of a mere bureau of the government had the arrogance to assume to set itself up as the protecter [sic] of the dignity and intelligence of a United States Court of Appeals" (R. 81).

district court recognized (R. 25), the Committee did not so consider these subsequent events. The Committee itself explicitly stated that it referred to these only as they were relevant to the conduct of the respondents with respect to the filing of the Clarke article in the Patent Office. "These subsequent events," the Committee noted, "cast their light backwardly on the activities of the parties during the time of preparation and filing of the Clarke article, giving added illumination with regard to the purposes, understandings, and intentions of respondents at that time" (R. 54-55)." Clearly, therefore, these events were not the basis of charges for which anyone was disbarred.

3. The Patent Office found not only that respondent had concealed the true authorship of the article, but that the article was presented to the Office as if it pertained to the Peiler application, whereas "in truth, the comparison was of the commercial success of the gob feeding machines in general—of which there was several types other than Peiler's—with the commercial success of the Owens machines" (R. 66). Respondent argued below—but the court below did not hold—that he had not been charged with

<sup>&</sup>lt;sup>31</sup> That the other respondents regarded these subsequent events as relevant is obvious from the fact that these events are extensively discussed in their answers to the order to show cause and affidavits filed before any evidence was introduced (Tr. 605, 958 et seq., 981 et seq.).

misrepresenting the content of the Clarke article to the Patent Office.

a. The order to show cause (R. 9-10) does not charge specifically misrepresentation as to the content or teaching of the article, although it contains language which might suggest that the entire subject of the presentation of the article to the Patent Office was under inquiry (R. 9). But the point in question was fully explored in the testimony, without objection from anyone. The article itself shows on its face that it refers to all gob feeders, not merely Peiler's (Tr. 701, et seq.) as Clarke, respondents' first witness and the signer of the article, admitted (Tr. 252). Subsequently, for the apparent purpose of showing that the article was not intended to support the Peiler application, the same point was brought out by counsel for the other respondents,32 on direct examination of Peiler (Tr. 317), R. D. Brown (Tr. 362), Hatch (Tr. 479-480), Carter (Tr. 607, 614-615), and Hostetler (Tr. 683, 685)." Indeed, counsel for Hatch and Brown asserted that the article did not apply exclusively to Hartford's machines (Tr. 506). These statements prompted an inquiry into the subject more fully in cross-examination. See Tr. 321-322 (Peiler); Tr. 366 (R.

23 These were all the witnesses, except for Dorsey who

submitted himself for cross examination.

<sup>&</sup>lt;sup>22</sup> Dorsey appeared *pro se*, and permitted counsel for the other respondents to undertake the primary burden in the proceeding.

D. Brown), Tr. 533-535 (Hatch), (R. 142-146) (Dorsey). According to the evidence (R. 120), Dorsey had dictated the portion of the brief which represented the article as proving that "appellant's [Hartford's] feeders \* \* have revolutionized the art" (R. 144, Ex. E, p. 477). As a result, Dorsey was cross-examined as to how the article "justified the argument that the Peiler invention \* had revolutionized the art" (R. 143). He admitted that "there is nothing in the Clarke article that would indicate that Peiler was the broad inventor" (R. 144), and sought to explain away his use of the article to give a different impression (R. 144-145). He did not object to the questioning on this point.

Thus the facts relating to this issue were elicited largely at the instance of other respondents' counsel, and Dorsey in particular was given a full opportunity to state his position and to tell what occurred. The basic evidence was the article and Dorsey's brief, as well as other documentary material in the Patent Office file; indeed, the misrepresentation as to authorship and as to the content of the article are found in the same sentence of the brief. Since both oc-

<sup>&</sup>lt;sup>34</sup> The evidence on this point is summarized more fully in the findings of the Committee (R. 52-54).

<sup>&</sup>quot;That the appellant's feeders have been a tremendous success and have revolutionized the art from the standpoint of economy is recognized by reluctant witnesses. We call attention to the article by William P. Clarke," etc. (R. 119, 144, Ex. E. p. 477).

curred during the course of the same transaction and since all pertinent testimony on the latter was heard, it is clear that Dorsey was given a fair opportunity to defend himself on this issue.

Although the Rules of Civil Procedure are not applicable to proceedings before the Patent Office, they provide the answer to the contention that findings based upon evidence introduced on an issue not pleaded violate the Due Process Clause. Rule 15 (b) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. [Italics supplied.]

### Rule 54 (e) states:

\* \* every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

These rules, which obviously are not unconstitutional,\* indicate that it was entirely proper for the Patent Office here to base its decision on evi-

<sup>&</sup>lt;sup>36</sup> The rules reflected the prior practice. See Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221, 232; Mutual Ben. Association v. Moyer, 94 F. 2d 906 (C. A. 9).

dence taken without objection in the circumstances described above. Many cases have held that the failure to object to evidence on a point is an implied consent to consideration of the issue. Venuto v. Robinson, 118 F. 2d 679, 683 (C. A. 3); United States v. Cushman, 136 F. 2d 815, 817 (C. A. 9), certiorari denied, 320 U. S. 786; Pennsylvania Casualty Co. v. Miller, 145 F. 2d 292 (C. A. 7); Lientz v. Wheeler, 113 F. 2d 767, 769 (C. A. 8); Moore v. DeGuire, 43 F. Supp. 70 (S. D. N. Y.), affirmed, 125 F. 2d 486 (C. A. 2). Here, the point in question was closer, related to the issue pleaded, and was fully developed in the evidence largely by respondents themselves as well as through documents already introduced.

Disciplinary proceedings, even in the courts, are civil, not criminal, in nature. Randall v. Brigham, 7 Wall. 523; Ex parte Wall, 107 U. S. 265; In re Claiborne, 119 F. 2d 647 (C. A. 1). a disciplinary proceeding is not and should not be tried as a criminal case, and where, as here, a multi-partite situation is involved in such a proceeding, the court should be untrammelled in its investigation of every facet thereof." In re Gladstone, 28 F. Supp. 858, 860 (S. D. N. Y.). "It was not necessary that these [disciplinary] charges should have been presented with the same particularity and formality as is ordinarily required in criminal actions." Philbrook v. Newman, 85 Fed. 139, 140 (C. C. N. D. Cal.).

As long as a respondent in a disbarment proceeding has a fair opportunity to explain and defend his conduct, his rights are not violated.

b. The Patent Office, of course, also found Dorsey guilty of concealing the authorship of the article, an offense unquestionably adequately described in the order to show cause. This finding. in itself, was sufficient to support the order of disbarment. Since, as we show elsewhere in the brief, this finding was fully supported by the evidence, the Commissioner's order (R. 10-11)which stressed this aspect of the findings-should be sustained irrespective of the findings as to the misuse of the article. Even in criminal law a general verdict stands if one count "is good and warrants the judgment" (Pinkerton v. United States, 328 U. S. 640, 642n; Claassen v. United States, 142 U. S. 140, 146-7), and a concurrent sentence on several counts will not be set aside if any count is sustained (Brooks v. United States. 267 U. S. 432, 441, and cases cited; Hirabayashi v. United States, 320 U.S. 81, 85). As the Circuit Court stated in a disbarment case (Philbrook v. Newman, 85 Fed., at 141):

It seems to be claimed by plaintiff that he was tried upon other charges than those specified in the citation, and found guilty of these. \* \* If there were a number of charges against the plaintiff, and the court had jurisdiction to hear and determine only one, and that one was sufficient to support the judgment, that would

make the judgment valid. In an indictment containing a number of counts, this has been held to be the rule. A verdict and judgment will be sustained if any count is good. Claassen v. U. S., 142 U. S. 140, 12 Sup. Ct. 169; U. S. v. Pirates, 5 Wheat. 184. This is certainly the rule in civil cases.

### III

## THE LAPSE OF TIME DOES NOT INVALIDATE THE DISBARMENT ORDER

The 18-year interval between the preparing and presenting of the Clarke article to the Patent Office in 1926 and the issuance of the show cause order to disbar Dorsey from practice before the Patent Office therefor in 1944 does not, as the court below held (R. 69-72), in any way undermine the propriety of the Commissioner's disbarment order. In the first place, it has never been contended by Dorsey nor held by the court below that statutes of limitations apply to actions to disbar. See United States v. Parks, 93 Fed. 414 (C. C. D. Colo.). In the second place, it is plain that even could the doctrine of laches be applied against the Government, it has no place here in view of the circumstances. Although the Clarke article itself was prepared and presented to the Patent Office in 1926, the facts in regard thereto were not brought fully to light until at least thirteen years later. As pointed out by this Court in rejecting a contention based on the lapse of time advanced in the Hazel-Atlas case in opposition to the reopening of the judgment sustaining the Peiler patent, "Indisputable proof of the facts was, for the first time, fully brought to light in 1941 by correspondence files, expense accounts and testimony introduced at the trial of the United States v. Hartford-Empire Company et al., 46 F. Supp. 541, an antitrust prosecution begun December 11, 1939." 322 U. S. at 243. Such "success in concealing fraud for many years" does not "create a prescriptive right to exemption from its consequences." R. 84 (Judge Edgerton dissenting).

Moreover, the Commissioner of Patents acted promptly in issuing the show cause order. The district court in the antitrust case entered its findings on August 25, 1942. 46 F. Supp. 541. In November 1942, before the entry of these findings, Hazel-Atlas had petitioned the Court of Appeals for the Third Circuit to reopen its judgment. Record in No. 398, October Term, 1943, pp. 5-9. The Hazel-Atlas case was not finally terminated until June 12, 1944, when this Court denied rehearing. 322 U.S. 772. See R. 41. The show cause orders were issued in October 1944 (R. 9). While these cases were pending, "the Office did not feel justified in taking any action in the premises until after the respondents had full opportunity to take such steps in the cases cited as to them might have seemed appropriate" (R. 41).

In re Adriaans, 28 App. D. C. 515, relied on

by the court below as a "bay-horse" (R. 70), is distinguishable and not here controlling. In that case there was a 12-year delay in instituting charges, although all the facts relating to the alleged misconduct were known from the outset. In the present case, on the other hand, the delay was due to Hartford's success in concealing for at least 13 years the facts surrounding the Clarke article. In addition, the court in the Adriaans ease found that independently of the delay the evidence did not support the disbarment order. Here, on the other hand, as we have already demonstrated, there is no such deficiency; the evidence here conclusively shows that a fraud had been perpetrated upon the Patent Office and Dorsey had participated therein.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below is erroneous and should be reversed.

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